

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

SEP 13 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0119-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
KEITH ROYAL PHILLIPS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR61452

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; VACATED AND REMANDED

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V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Keith Phillips seeks review of the trial court's order summarily dismissing all but one of the claims raised in his petition for post-conviction relief filed

pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court's ruling unless it clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Phillips was convicted in 1999 of numerous felonies, including attempted first-degree murder and multiple counts of armed robbery, kidnapping, and aggravated assault, all stemming from his participation in a series of robberies. *See State v. Phillips*, 202 Ariz. 427, ¶ 1, 46 P.3d 1048, 1052 (2002) (*Phillips I*). He also was found guilty of first-degree felony murder and premeditated murder and sentenced to death. *Id.* On appeal, our supreme court reversed his conviction for premeditated murder but affirmed his remaining convictions and sentences. *Id.* ¶ 83. Before its mandate issued in that case, however, the court determined Phillips had been sentenced to death under the procedure found unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002). *State v. Phillips*, 205 Ariz. 145, ¶ 1, 67 P.3d 1228 (2003) (*Phillips II*). The court found the sentencing error in Phillips's case was not harmless, vacated his death sentence, and remanded his felony murder conviction for resentencing. *Id.* ¶ 15. On remand, the trial court sentenced Phillips to a natural life term of imprisonment and imposed new prison terms on his lesser felony counts. We affirmed the natural life term but vacated the sentences on the other counts, concluding the court had no authority to resentence Phillips on those counts. *State v. Phillips*, No. 2 CA-CR 2004-0365 (memorandum decision filed Oct. 31, 2006).

¶3 Phillips then filed a notice and petition for post-conviction relief, asserting his trial counsel had been ineffective for failing to object to certain evidence and in failing to request certain jury instructions, and that his due process rights had been

violated when the trial court did not give those instructions sua sponte. He also asserted that the court had violated his due process rights by precluding evidence of third-party culpability, that “the felony murder doctrine is unconstitutional as applied in this case,” and that he should never have been charged with a capital crime. Phillips further argued his attempted murder conviction should have been vacated for the same reason our supreme court vacated his conviction of premeditated murder and, in his reply to the state’s answer, that his appellate counsel was ineffective for failing to raise that claim. He also raised claims related to his sentencing, asserting his sentences had been enhanced and aggravated based on improper factors and that he should have received concurrent sentences for his crimes.

¶4 The trial court concluded Phillips had raised a colorable claim of ineffective assistance of appellate counsel regarding his attempted murder conviction and set an evidentiary hearing on that issue. It summarily dismissed the remainder of Phillips’s claims, concluding he had not demonstrated counsel’s conduct fell below prevailing professional norms or that he had not been prejudiced by counsel’s purported omissions, and his other claims were precluded because they either were raised or could have been raised on appeal. After an evidentiary hearing, the court determined Phillips’s appellate counsel had been ineffective for failing to argue, related to his attempted murder conviction, that he lacked the requisite intent to kill the victim. Thus, the court granted Phillips leave to file a delayed appeal on that ground.

¶5 On review, Phillips reurges his ineffective assistance of trial counsel claims and his claims that the trial court erred in failing to give limiting instructions sua sponte

and in precluding evidence of third-party culpability, and additionally asserts he was entitled to an evidentiary hearing. We conclude the court correctly rejected Phillips's claims in a thorough, well-reasoned minute entry, and we need not repeat its analysis here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

¶6 The trial court's grant of relief on Phillips's claim of ineffective assistance of appellate counsel, however, requires additional examination. Phillips did not file his notice of post-conviction relief until shortly after our mandate issued in his appeal following his resentencing. But our supreme court's mandate in his first appeal, which affirmed his felony murder conviction, as well as his convictions and sentences for his non-capital crimes, was issued in June 2003—over four years before he filed his notice. Under Rule 32.4(a), a notice must be filed "within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later."¹ *See also* A.R.S. § 13-4234(C). And those time limits are jurisdictional, requiring an untimely notice to be dismissed with prejudice. § 13-4234(G). Thus, we must determine whether Phillips was required to file his notice within thirty days of our supreme court's mandate affirming his convictions and his sentences

¹Although Phillips's case was initially a capital case, the clerk of the Supreme Court was not required to file his notice of post-conviction relief pursuant to Rule 32.4(a) because his death sentence was not affirmed.

save his capital sentence, or within thirty days of our mandate issued in his appeal from his resentencing for his conviction of felony murder.²

¶7 We find *State v. Rosales*, 205 Ariz. 86, 66 P.3d 1263 (App. 2003), instructive in resolving this question. There, Rosales initially had petitioned for and was granted permission to file a delayed appeal pursuant to Rule 32.1(f) because his failure to file a timely notice of appeal was without fault on his part. *Id.* ¶ 3. On appeal, we affirmed his convictions but remanded his case for resentencing on some, but not all, of his convictions. *Id.* Before resentencing, however, Rosales filed a second notice of post-conviction relief. *Id.* ¶ 4. The trial court dismissed it, among other reasons finding the notice premature because resentencing had not yet occurred. *Id.* On review, we determined the notice had not been premature because “[t]he only possible way to raise” an ineffective assistance of appellate counsel claim “would be by initiating Rule 32 proceedings by filing a notice within thirty days of the issuance of this court’s mandate finalizing the appeal.” *Id.* ¶ 8. And, we noted, Rosales could have raised any claim that counsel had been ineffective at resentencing in a different Rule 32 proceeding. *Id.*

¶8 Under the reasoning in *Rosales*, it appears Phillips’s notice was untimely as to claims not related to his resentencing. Although he asserts his appeal was not “final”

²We restrict this analysis to Phillips’s claim of ineffective assistance of appellate counsel because the trial court correctly rejected Phillips’s other claims and we may affirm for any reason supported by the record. *See State v. Olquin*, 216 Ariz. 250, n.5, 165 P.3d 228, 231 n.5 (App. 2007). Further, although Phillips asserts he also raises a claim of ineffective assistance of appellate counsel during his appeal from his resentencing, we find no such claim in his petition for post-conviction relief nor his petition for review, and he provides no supporting citation to the record. *See Ariz. R. Crim. P. 32.9(c)(1)* (requiring petition for review to “contain specific references to the record”).

until our mandate issued, he does not explain why our supreme court's mandate was not final as to all of his convictions and all sentences except his life sentence. That mandate marked the end of his direct appeal of those convictions and sentences. Thus, if *Rosales* applies, the time for filing a notice of post-conviction relief must be calculated from the date of that mandate.

¶9 We agree with Phillips that there is a judicial interest in preventing “multiple post-conviction reviews” and that “premature litigation” of post-conviction claims “wastes scarce criminal justice resources.” *Rosales*, 205 Ariz. 86, ¶ 14, 66 P.3d at 1267. But Rule 32 claims such as ineffective assistance of counsel often are fact-intensive, requiring, for example, evidence concerning the reason counsel may have acted or declined to act, or what counsel may have told a defendant. *See State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (1995) (trial court “better equipped to resolve the factual disputes that frequently underlie assertions of ineffective assistance of counsel”); *State v. Bell*, 23 Ariz. App. 169, 171, 531 P.2d 545, 547 (1975) (“Rule 32 has as its aim the establishment of proceedings to determine the facts underlying a defendant’s claim for relief when such facts are not otherwise available.”). The passage of time, of course, may render evidence relevant to those findings less reliable and less complete. *See Logerquist v. Danforth*, 188 Ariz. 16, 22, 932 P.2d 281, 287 (App. 1996) (recognizing “potential evidentiary problems” caused by passage of time, including that “witnesses may no longer be available; and evidence becomes less trustworthy because memories fade or are affected by intervening events and experiences”); *see also State v. Jones*, 182 Ariz. 432, 897 P.2d 734 (App. 1995) (Rule 32 time limits intended “to prevent

unwarranted delay” in final resolution of cases). And, under *Rosales*, it would not have been premature for Phillips to seek post-conviction relief immediately following the supreme court’s mandate. *Rosales*, 205 Ariz. 86, ¶ 8, 66 P.3d at 1266. Although Phillips complains that there is no basis for a “bifurcate[d]” post-conviction relief proceeding, that is the procedure *Rosales* appears to require.

¶10 Our inquiry, however, does not end with *Rosales*. The state and Phillips agree that, following the supreme court’s remand, the trial court determined it was permitted to resentence Phillips for all of his convictions—not just on his felony murder conviction. Although the trial court was not permitted to do so, its decision raises the question whether Phillips was still required to file his notice within thirty days of our supreme court’s mandate.

¶11 In *State v. Viramontes*, 211 Ariz. 115, 118 P.3d 630 (App. 2005), we addressed the application of *Rosales* in similar circumstances. There, our supreme court had vacated the defendant’s only sentence—natural life imprisonment—and remanded the case for resentencing. *Id.* ¶ 2. He was sentenced to life imprisonment with the possibility of parole; a sentence we affirmed following the state’s appeal. *Id.* Shortly after resentencing, but before his appeal, Viramontes filed a notice of post-conviction relief and later filed a petition challenging his conviction and sentence. *Id.* ¶ 3. The trial court dismissed his claims as untimely based on *Rosales*, concluding that Viramontes should have filed his claims within thirty days of our supreme court’s mandate in his first appeal. *Id.* ¶¶ 3, 6. On review, we distinguished *Rosales*, reasoning that, unlike *Rosales*, Viramontes’s only sentence had been vacated and, “[t]herefore, once that sentence no

longer existed, no entry of judgment or sentencing date remained from which to calculate the time for initiating the post-conviction proceeding” and that his notice, filed only sixteen days after his resentencing, was therefore timely. *Id.* ¶ 8.

¶12 Thus, pursuant to *Viramontes*, if the trial court effectively vacated Phillips’s sentences by announcing its intent to resentence him on all of his convictions, there would be no date from which to calculate the due date of his notice of post-conviction relief and his notice, filed within thirty days of our mandate in his resentencing appeal, would be timely. *See* Ariz. R. Crim. P. 32.4(a). But that reasoning only applies if the trial court made the decision to vacate Phillips’s sentences within thirty days of our supreme court’s mandate. Otherwise, Phillips’s notice already would have been due. From the record before us, however, it is not clear when the trial court determined Phillips would be resentenced. Accordingly, we must remand this matter to the trial court to make that determination.

¶13 We additionally observe that, should the trial court find Phillips’s notice to have been timely filed, it did not have the authority to grant the relief it did on Phillips’s claim of ineffective assistance of appellate counsel. The court, as we noted above, granted Phillips permission to file a “delayed appeal.” But that relief is only available pursuant to Rule 32.1(f) when the defendant failed to file a notice of appeal. *See Rosales*, 205 Ariz. 86, ¶ 3, 66 P.3d at 1264; *State v. Stice*, 23 Ariz. App. 97, 99, 530 P.2d 1130, 1132 (1975) (“The only basis for permitting a delayed appeal [under Rule 32] is that the petitioner’s failure to appeal was without fault on his part.”); *see also State v. Herrera*,

183 Ariz. 642, 646-47, 905 P.2d 1377, 1381-82 (ineffective assistance of appellate counsel properly raised in Rule 32 proceeding).

¶14 Instead, as our supreme court made clear in *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006), when a trial court finds appellate counsel has been ineffective and counsel's conduct prejudiced the defendant, the court should grant the relief the defendant would have been accorded on appeal. In *Bennett*, our supreme court remanded Bennett's claim of ineffective assistance of appellate counsel for an evidentiary hearing. *Id.* ¶ 30. The court instructed the trial court that, if the conduct of Bennett's appellate counsel fell below prevailing professional norms, then it must determine "the legal issue of whether this deficiency prejudiced Bennett, i.e., whether the court of appeals would have reversed Bennett's felony murder conviction had the issue of sufficiency of the evidence been raised on appeal." *Id.* And, the court concluded, "[i]f the [trial] court concludes that Bennett suffered prejudice, it should vacate the felony murder conviction." *Id.*

¶15 In sum, we cannot fairly penalize Phillips because the trial court, after our supreme court's remand in Phillips's first appeal, acted without authority in resentencing him on all of his convictions. If the trial court issued its decision to resentence Phillips within thirty days of the supreme court's mandate in that appeal, Phillips could not reasonably have been on notice of any requirement to file for relief. Therefore, his notice of post-conviction relief was timely filed, and the trial court is authorized to grant relief consistent with *Bennett* on Phillips's claim of ineffective assistance of appellate counsel. If, however, the thirty-day time limit of Rule 32.4(a) had run before the trial court's

decision, his notice of post-conviction relief was untimely and the trial court has no authority to grant relief.

¶16 For the reasons stated, we grant review, vacate the trial court's order granting Phillips a delayed appeal, and remand this matter to the trial court to determine whether Phillips's notice of post-conviction relief was timely filed. If the notice was timely filed, we instruct the trial court to order relief consistent with this decision.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge